IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5746 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANISH @ BALI DAMJIBHAI KUMBHAR

Versus

STATE OF GUJARAT

Appearance:

MR HR PRAJAPATI for Petitioner

MR MR PRAJAPATI for Petitioner

MR IM PANDYA AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 26/04/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the

petitioner challenging his detention in pursuance of the order passed against him by Police Commissioner, Rajkot City, on 08th of February, 2005, in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 08th of February, 2005 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at the subjective satisfaction. Firstly, the detaining authority took into consideration two crimes registered against the petitioner for the breach of the provisions of the Bombay Prohibition Act, and secondly, two in-camera statements, as recorded by the sponsoring authority on 5th of February, 2005 as verified by the detaining authority on 6th of February, 2005. The identify of the witnesses is not disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act.

3. Out of two crimes, the first crime came to be registered against the petitioner before Tankara Police Station, Rajkot Rural, on 10th of August, 2004, for the offences punishable under Sections 66 (b), 65(a) (e),116 (b), 81 and 83 of the Bombay Prohibition Act. It was found that the petitioner was in possession of 3360 bottles of prohibited liquor. The second case came to be registered before Bhaktinagar Police Station, Rajkot, on 2nd of February, 2005 for the same offences as in first case and petitioner was found in possession of 6 bottles of prohibited liquor. The detaining authority thoroughly and exhaustively considered the investigation papers in both the crimes.

4. Out of two in-camera statements, first incident is of 17th of December, 2004. At about 6.00 p.m. the witness was present at his place of business and was approached by the petitioner and his accomplices with one bag containing three bottles of prohibited foreign liquor. The witness was told by the petitioner that those three bottles were to be kept by the witness and the customer would take those bottles and the witness would get good commission. The witness refused the offer of the petitioner. Thereupon, the petitioner got excited and started abusing the witness. The witness stated that if he was to be treated with bullying tactics, he would be constrained to provide information to the police about the activities of the petitioner. The petitioner was

more excited and started beating the witness and took out a knife from his pocket and threatened the witness that if witness dared to inform the police, he would be done to death. Though a crowd was gathered, but to create terror, the petitioner ran towards the crowd with open knife, so people started running helter - skelter and fear was spread in the area and public order was disturbed. The second incident is of 16th of January, 2005. At about 7.00 p.m., the witness was present at this place of business and was approached by the petitioner with one carton. The witness was told that after hiring rickshaw he was to deliver the said carton containing the prohibited liquor to a customer. The witness refused the offer of the petitioner. Thereupon, the petitioner got excited and started beating the witness. The witness was also threatened by the petitioner through a knife and the petitioner threatened that if the witness inform police he would be done to death. A crowd was gathered, but to create terror, petitioner ran towards the crowd with open knife, so people started running helter - skelter and public order was disturbed.

5. Relying upon the above material, the detaining authority concluded that the petitioner was dealing in storing, selling and transporting the prohibited liquor and was harassing innocent citizens, who became obstacles in his illegal activities of selling prohibited liquor. In view of the detaining authority, the petitioner was a bootlegger within the meaning of the PASA Act. The detaining authority also concluded that the activities of the petitioner were prejudicial to the maintenance of public order and adversely affecting the public health and were required to be prevented forthwith. After considering the other remedies available against the petitioner under the general law, the detaining authority reached to the subjective satisfaction that there was no other alternative except to detain the petitioner under the PASA Act. The detaining authority therefore passed the order of detention of the petitioner, as aforesaid, which is under challenge in this petition.

6. Learned advocate Mr.M.R. Prajapati for the petitioner and learned AGP Mr.I.M.Pandya AGP for the respondents were heard at length.

7. Out of various grounds urged on behalf of the petitioner to challenge the order of detention as opposed and controverted by the learned AGP, it appears that this petition can be examined and disposed of on the sole issue whether the detaining authority applied mind

properly to the material placed before him in arriving at subjective satisfaction.

8. The grounds of detention placed on record make it abundantly clear that the petitioner was in judicial custody in both cases registered against him, when the order of detention was executed and served upon him on 08th of February, 2005. The grounds of detention further reveal that the petitioner was arrested on 2nd of February, 2005 in the crime shown at Sl. No.2 and on 3rd of February, 2005 in the crime shown at Sl. No.1. In this respect, the detaining authority reached to the subjective satisfaction that though the petitioner was in judicial custody in both the cases registered against him at the time of execution of the order of detention, but, however, at any time, the petitioner was likely to move applications for bail in the said cases and after releasing on bail, the petitioner was likely to continue his illegal activities.

9. The facts of the present case are squarely covered by the decision of the Apex Court in the matter of Amritlal and other Vs. Union Government through Secretary, Ministry of Finance and others, as reported in AIR 2000 (1) S.C. 3675, wherein the Apex Court observed that there must be cogent materials before the officer passing the detention order that the detenu was likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail was not held a cogent material and the detention order based on such material was held liable to be quashed.

10. True it is that the order of detention can be passed and executed upon the detenu, even if, the detenu is in judicial custody. The judicial custody necessarily implied that the detenu is out of circulation and in confinement. Therefore, in this respect the law is established that though the order of detention can be passed and executed, even if, the detenu is in custody, than the subjective satisfaction of the detaining authority that the custody of the detenu was likely to be ended, must be based upon the cogent materials. This is the ratio laid down by the Apex Court in the matter of Amritlal [supra]. In the present case, it becomes clear from the grounds of detention that the petitioner was arrested on 2nd of February, 2005 in a crime registered against him before Tankara Police Station and right from 2nd of February, 2005 till 08th of February, 2005, the petitioner was in judicial custody in both the cases.

The petitioner had not even moved any bail applications in such cases which becomes clear from the grounds of detention because the detaining authority mentioned in the grounds that the petitioner was likely to move applications for bail in the said two cases. Though the Apex Court made it clear in abovesaid decision that the filing of an application for bail is not itself a cogent material to infer that the detenu-petitioner was likely to be released on bail. In the present case, the petitioner had not preferred even applications for bail till the execution of the order of detention. The subjective satisfaction, therefore, arrived at by the detaining authority that firstly, the petitioner was likely to move applications for bail and again going further that on filing of such applications for bail, the petitioner was likely to be released on bail, is not based on any materials placed before the detaining authority let alone any cogent material. Learned advocate for the petitioner makes a statement that subsequently, the petitioner filed applications for bail and he might have been released on bail. The point in issue is whether the detaining authority applied mind properly in arriving at subjective satisfaction. In the above view of the matter, it becomes clear that on two aspects, firstly for moving applications for bail and secondly releasing the petitioner on bail, no material at all appears to have been placed before the detaining authority and the detaining authority reached to the positive conclusion in this respect. In both the above aspects, the subjective satisfaction arrived at by the detaining authority is not valid, legal and in accordance with law. The order under challenged, therefore, is required to be quashed and set aside on this ground alone.

11. In the result, the petition is allowed. The order passed by the Police Commissioner, Rajkot City, on 08th of February, 2005 against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu - Manish alias Bali Damjibhai Kumbhar is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

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